IN THE

Supreme Court of the United States

No.

MYRTLE FRANCES BROCKI,
Petitioner,

v.

AMERICAN EXPRESS COMPANY, a New York Joint Stock Association, and
DEMERY'S, INC., a New Jersey corporation,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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To: The Honorable Supreme Court of the United States:

Myrtle Frances Brocki, Petitioner, respectfully petitions this Court for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, and represents:

OPINIONS OF LOWER COURTS

That she deems herself aggrieved and wronged by the judgment of the District Court of the United States for the Eastern District of Michigan, Southern Division, dismissing her suit against American Express Company, and the judgment of the United States Court of Appeals for the Sixth Circuit affirming said judgment. Appended hereto is the opinion of the Judge of the District Court for the Eastern District of Michigan reported in 172 Fed. Supp. 648. The annexed opinion of the United States Court of Appeals for the Sixth Circuit affirming said judgment has not been reported officially or unofficially to this date.

GROUNDS UPON WHICH JURISDICTION IS BASED

Petitioner maintains that there are special and important reasons to review the instant judgment of the United States Court of Appeals for the Sixth Circuit. The most cogent reason is that the decision of said Court is in conflict with a decision of the United States Court of Appeals for the Third Circuit on the same matter: *VanSant v. American Express Company*, 169 Fed. (2d) 355 (C.C.A. 3, 1948). In *VanSant* the Third Circuit ruled it had diversity jurisdiction in an action against the Respondent, American Express Company:

> "Since this is a diversity of citizenship case, the conflict of laws rule to be applied must conform to that prevailing in the courts of the state wherein the district court sits."
>
> • • • • •
>
> "Appellant by her application to further amend her complaint seeks to allege that American Express 'a citizen, of the State of New York, is a joint

> stock association organized under the laws of New York'. American Express in opposing this says primarily that it is an unincorporated association with no citizenship of its own and cannot be sued in the federal courts on the basis of diversity. It also urges that as it had a member residing in Virginia when suit was commenced there is no diversity between it and appellant who is 'likewise alleged to reside in Virginia'.
>
> American Express is a joint stock association formed under the laws of the State of New York. *Mack v. American Express Co.*, 20 Misc. 215, 45 N. Y. S. 362. *As such it is considered for practical purposes a corporation by the courts of that state.*" (Citing New York cases) (Emphasis added.)

The Sixth Circuit rejected diversity jurisdiction against Respondent, American Express Company, because some of its stockholders were citizens of Michigan:

> "It follows that we must consider this to be an unincorporated association, and hence it cannot be deemed a citizen, apart from its members, for the purpose of diversity jurisdiction."

This Court should grant certiorari to resolve the conflict between the decisions of the Third and Sixth Circuits.

The question presented for review is also important because the American Express Company transacts business in many states of the United States and trial courts and litigants are entitled to know whether or not this organization is immune from suit in the Federal Courts because it lacks citizenship apart from the citizenship of its stockholders.

STATUTE AUTHORIZING REVIEW

The judgment of the United States Court of Appeals for the Sixth Circuit which Petitioner seeks to review was dated and entered in said Court on June 16, 1960.

The statutory provision which Petitioner believes confers jurisdiction on this Court to review the judgment in question by writ of certiorari is Title 28, paragraph 1254, of the United States Code which provides:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

QUESTION FOR REVIEW

The question presented for review: Is the Respondent, American Express Company, (a New York statutory business association designated as a joint stock association but admitted to do business in Michigan as a New York corporation) a citizen of the State of New York so as to confer diversity jurisdiction on a Federal Court in Michigan to hear and determine a controversy between it and a citizen of Michigan pursuant to Article III, Section 2, of the Constitution of the United States?

The lower Courts decided that American Express Company was not an entity apart from its stockholders and the Federal Courts have no diversity jurisdiction.

Petitioner maintains that American Express Company is a legal entity and is a citizen of the State of New York for diversity jurisdiction.

CONSTITUTIONAL PROVISION

Article III, Section 2, of the Constitution of the United States vests in the Federal Courts jurisdiction over controversies between citizens of different states. The constitutional provision is as follows:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—*between Citizens of different States*,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." (Emphasis added.)

STATEMENT OF THE CASE

(Numbers in parentheses refer to pages in Appellant's Appendix)

Petitioner commenced suit against the Respondent, American Express Company, in the United States District Court for the Eastern District of Michigan, Southern Division (2a, 3a, 4a, 5a). Her complaint alleged that she was a citizen of the State of Michigan and resided in the City of Detroit (2a); that the Respondent, American Express Company, was a corporation organized and existing under and by virtue of the laws of the State of New York, and that the Court had jurisdiction of the controversy because of the diversity of citizenship of the parties (2a). The Respondent, American Express Company, answered

the complaint and denied that it was a corporation (6a); it alleged that it was a joint stock association with its principal office in the City and State ow New York and had stockholder-members residing in Michigan (6a). The affidavit of Respondent's Senior Vice-President and Secretary in support of the motion to dismiss stated that it was "an unincorporated joint stock association organized and existing under the laws of the State of New York" (11a), and had more than 22,000 stockholder-members and more than 200 were residents of Michigan (11a).

The suit was commenced February 19, 1953, and, after pretrial hearing, the case was placed on the suspended docket by formal order of the District Court. This order was embodied in the record filed in the Court of Appeals, but was not printed in the appendix. The purpose of placing the case on the suspended docket of the Court was to give the parties an opportunity to ask Congress to grant relief to Petitioner on her claim which arose out of the refusal of the Veterans Administration to accept a timely dispatched American Express money order to pay a premium on her husband's National Service Life Insurance causing it to lapse (2a, 3a, 4a, 5a). After all efforts to secure Congressional relief failed, the Respondent, American Express Company, on February 17, 1959, filed a motion to dismiss (10a). The basis for the motion was lack of diversity of citizenship between the Petitioner and Respondent, American Express Company (10a).

Petitioner answered this motion and alleged that the Respondent, American Express Company, was a New York corporation (12a). She supported this allegation with the official certificate of the Michigan Corporation & Securities Commission bearing the seal of said State certifying that the "AMERICAN EXPRESS COMPANY, a New York

corporation," was admitted to do business in Michigan (14a), and that "The corporation has filed all annual reports, * * *", and that the certificate "is entitled to have full faith and credit given it in every court and office within the United States" (14a), *Respondent was not admitted to do business in Michigan as a joint stock association.*

The District Court filed an opinion in which it refused to follow *VanSant v. American Express Company,* 169 Fed. (2d) 355 (C.C.A. 3, 1948) (15a, 16a). The District Court ruled as a matter of law that Respondent, American Express Company had no citizenship apart from its stockholders and dismissed Petitioner's suit without trial on the merits (15a, 16a, 17a).

Petitioner appealed to the United States Court of Appeals for the Sixth Circuit. Petitioner submits that the Sixth Circuit erroneously failed to follow *VanSant v. American Express Company,* 169 Fed. (2d) 355 (C.C.A. 3, 1948), and affirmed the judgment of the District Court.

Petitioner maintains that the Respondent, American Express Company, is a legal entity separate and distinct from its stockholders because the organizing statutes of New York created a juridical person with New York citizenship, and, thus, a Federal Court in Michigan has diversity jurisdiction.

ARGUMENT

There is no question that Petitioner is a citizen of the State of Michigan. The only problem is whether or not the Respondent, American Express Company, licensed to do business in Michigan as a New York corporation, is a juridical person with New York citizenship.

Respondent, American Express Company, is a statutory association; it is not a common law association of any kind. It should not be judged by early concepts of common law joint stock companies. Its existence as a juridical person should be determined by the powers conferred upon it by the New lork Constitution and statutes, by the procedure which New York requires to create such an organization, and the managerial and financial structure which New York requires in order for such an association to exist. Petitioner contends that the end-result is a New York juridical person apart from the citizenship of its stockholders.

The New York joint stock association does not come into existence by contract between individuals as such organizations were formed at common law. It can exist only by complying with the statutory procedure.

Petitioner will show that New York, in authorizing the creation and operation of joint stock associations, intended to create artificial entities separate and distinct from their stockholders, and that such entities have characteristics of persons and corporations, including New York citizenship.

The New York Constitution and Statutes fix their rights, powers and basic methods of operation. The New York Constitutional provision relating to actions and suits by and against corporations provides (Article X, Section 4; of The Constitution of the State of New York):

"[CORPORATIONS; DEFINITION; RIGHT TO SUE AND BE SUED.]

The term corporations as used in this section, and in sections 1, 2 and 3 of this article shall be construed to include all associations and *joint-stock companies* having any of the powers or privileges of corporations not possessed by individuals or partnerships. And all corporations shall have the *right* to sue and shall be subject to be sued in all courts in like cases as *natural persons*." (Emphasis added.)

This Constitutional provision indicates clearly that a New York joint stock association has the *right* to be sued as a natural person. A creditor's action is thus an action against a body corporate and not against the stockholders. (Respondent has more than 22,000 stockholders, and more than 200 are in Michigan (11a)). Obviously such an organization is an artificial entity separate and distinct from its stockholders!

New York statutory joint stock associations have all the characteristics, rights, powers and privileges of corporations. The *General Associations Law of New York* provides for their organization. McKinney's Consolidated Law of New York, Article 1, Section 2, defines the term:

"2. *Definitions*

As used in this chapter: 1. The term 'joint stock association' includes every unincorporated joint stock association, company or enterprise having written articles of association and capital stock divided into shares, but does not include a corporation or a business trust.

* * * * *

3. The term 'stockholder' means every member of a joint stock association.

4. The term 'association,' as used in article four of this chapter, means a joint stock association or a business trust as defined in this section."

Respondent admits that it was created and exists by statutory law pertaining to joint stock associations. Accordingly, Respondent must have "written articles of association and capital stock divided into shares"; it has stockholders because every member of the association must be a stockholder.

Article 2, paragraph 3 of the *General Associations Law* sets forth the provisions which may be contained in the articles of association of a joint stock association. The articles of association of a joint stock association may:

> "1. Provide that the death of a stockholder thereof, or the transfer of his shares of stock therein, shall not work a dissolution of the association;
>
> 2. Prescribe the number of its directors, not less than three, to have the sole management of its affairs;
>
> 3. Contain any other provision for the management of its affairs not inconsistent with law."

The articles of association of a joint stock association contain every provision customarily found in corporate charters. The articles may provide that the association shall continue after the death of a stockholder, or the transfer of his shares. In the case at bar, Respondent has not advised the Court of the specific provisions of its articles of association, but because it has been admitted to do business in Michigan as a New York corporation since 1907 (14a), and because it has over 22,000 stockholder-members (11a), we can safely state that its articles comply with New York law and properly provide for the perpetuation of its business upon the death of stockholders or the transfer of their shares. The Respondent has not stated whether or not it has a board of directors, but the foregoing statute provides that the articles of association "Pre-

scribe the number of its directors, * * * to have the *sole management of its affairs*" (emphasis added). Respondent admits it does have a "Senior Vice President and Secretary." (11a).

The *General Associations Law* (Article 2, paragraph 4) commands that it regularly file certificates indicating the name and date of organization, the number of stockholders, names and residences of officers, its principal place of business, and other information.

From the total picture of what New York has created, Respondent is a juridical person which has New York citizenship for the purpose of diversity jurisdiction. In *Williams v. Port Chester*, 97 App. Div. 84, 89 N.Y.S. 671, affirmed 183 N.Y. 550, 76 N.E. 1116, the New York Courts tell us that in authorizing the organization of statutory joint stock associations the Legislature had "the intention * * * that the artificial citizens to be created by the legislature should, in so far as their civil rights were concerned, be placed upon an equal, not a better, footing than natural born citizens.

The statute clearly expressed New York's concept of a joint stock association as a person separate and distinct from its stockholders by the definition of the term "person". The General Associations Law of New York, Article 2, paragraph 37 (McKinney's Consolidated Laws of New York Annotated, Vol. 21) states:

> "The term person includes a corporation and a joint stock association * * *."

The Federal Congress has also recognized that a joint stock company may be an artificial person (1 U.S.C.A. par. 1):

> "In determining the meaning of any Act of Congress, unless the context indicates otherwise—* * *.
>
> * * * * *
>
> the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and *joint stock companies*, as well as individuals;" (Emphasis added.)

Petitioner respectfully submits that the opinion of the Court of Appeals for the Sixth Circuit failed to give effect to the certificate bearing the seal of the State of Michigan (14a), evidencing Michigan's determination that the Respondent, American Express Company, was a New York corporation and that it was admitted to do business in that State only as a legal entity separate from its stockholders. The Respondent, by accepting the benefits conferred by its license to do business in Michigan, acknowledged corporate existence. Michigan citizens have the right to rely upon such determination by an official agency of their state. Federal Courts in Michigan should take cognizance of such determination. Under Michigan Law the Michigan Corporation & Securities Commission could have issued a certificate to the American Express Company to do business in Michigan as a joint stock association. It did not issue such certificate. The Michigan Statute permitting foreign business organizations to obtain authority to operate within its boundaries applies to joint stock associations (Mich. Stat. Ann. 21.98):

> "The term 'corporations' as used in sections 81 to 97, both inclusive, of this act shall be construed to include all associations, partnership associations limited, *joint stock companies* and common law trust or trusts created by statute, having any of the powers or privileges of corporations, not possessed by individuals or partnerships, *under whatever term or designation they may be defined and known in the state where organized.*" (Emphasis added.)

It was proper for the State of Michigan to create the state of facts under which it would give American Express Company the right to do business within its borders, and to permit it to enjoy this privilege only as a corporation. This principle was recognized by this Court in *Neirbo Company v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 84 L. Ed. 167, 60 Sup. Ct. 153, 128 ALR 1437. In *Neirbo* the problem was the constitutionality of a state law which required a foreign corporation to appoint a resident agent as a condition precedent to its right to do business in the state. Mr. Justice Frankfurter wrote that a foreign company was bound by the "bargain" which it made with the state:

> "The scope and meaning of such a designation as part of the bargain by which Bethlehem enjoys the business freedom of the State of New York, have been authoritatively determined by the Court of Appeals, speaking through Judge Cardozo: 'The stipulation is, therefore, a true contract' ".

The Court concluded:

> "We are recognizing that 'state legislation and consent of parties may bring about a state of facts which will authorize the courts of the United States to take cognizance of a case.' ".

Plaintiff submits that Michigan determined a state of facts that Defendant had corporate existence, and Defendant accepted this determination as part of the "bargain" by which it "enjoys the business freedom" of the State of Michigan. This "state of facts" should "authorize the courts of the United States to take cognizance of a case."

Petitioner further submits that the decision of the United States Court of Appeals for the Sixth Circuit in the instant case is in conflict with the decisions of this Court in

Puerto Rico v. Russell Company, 288 U.S. 476, 53 S. Ct. 447, 77 L. Ed. 903, and *Hemphill v. Orloff*, 238 Mich. 508 (judgment affirmed 277 U.S. 537, 72 L. Ed. 978). In *Puerto Rico v. Russell Company*, *supra*, this Court determined that a limited partnership organized under the laws of Puerto Rico had citizenship independent of its members for diversity purposes. After reviewing Puerto Rican Statutes authorizing the creation of limited partnerships, the Court ruled that there was a "treatment of the aggregate * * * as a person distinct from its members, with capacity to perform all legal acts, made it possible and convenient to treat it so for purposes of federal jurisdiction as well". Thus, the limited partnership was "a juridical person". This Court summarized its powers as follows:

> "It may contract, own property and transact business, sue and be sued in its own name and right. * * * *Its members are not thought to have a sufficient personal interest in a suit brought against the entity to entitle them to intervene as parties defendant.* * * * It is created by articles of association filed as public records. * * * Where the articles so provide, the *sociedad* endures for a period prescribed by them regardless of the death or withdrawal of individual members. * * * Powers of management may be vested in managers designated by the articles from among the members whose participation is unlimited, and they alone may perform acts legally binding on the *sociedad*. * * * Although the members whose participation is unlimited are made contingently liable for the debts of the *sociedad* in the event that its assets are insufficient to satisfy them * * * this liability is of no more consequence for present purposes than that imposed on corporate stockholders by the statutes of some states. * * * These characteristics under the Codes of Puerto Rico give content to their declaration that the *sociedad* is a juridical person. That personality is so

> complete in contemplation of the law of Puerto Rico that we see no adequate reason for holding that the *sociedad* has a different status for purposes of federal jurisdiction than a corporation organized under that law." (Emphasis added.)

The New York creation is analogous. New York law provides that such association has the *right* to be sued as a corporation; it must have written articles of association; the articles must be filed as public records; its members must be stockholders; the death of a member or the transfer of his shares shall not operate to dissolve the association; it must have a board of directors consisting of not less than three persons, "to have the sole management of its affairs"; it may contract, own property and transact business as a separate entity. It is difficult to conceive of any more complete "juridical person" than the Respondent, American Express Company, as it is organized and as it does business throughout the nation for the benefit of more than 22,000 stockholder-investors!

In *Hemphill v. Orloff*, 277 U.S. 537, 72 L. Ed. 978, this Court affirmed the judgment of the Michigan Supreme Court (238 Mich. 508) and said (p. 550):

> "Whether a given association is called a corporation, partnership, or trust, is not the essential factor in determining the powers of a state concerning it. The real nature of the organization must be considered. *If clothed with the ordinary functions and attributes of a corporation, it is subject to similar treatment.*" (Emphasis added.)

In this case the Court determined that a common law trust, generally known as a Massachusetts Trust, had corporate characteristics and personality so that it was "subject to similar treatment" as a corporation.

Respondent fits the classic definition of a corporation as defined by Chief Justice Marshall in *Trustees of Dartmouth College v. Woodward*, 4 Wheat. (17 U.S.) 518, followed in *Gledhill v. Fisher Co.*, 272 Mich. 353 at 363:

> "The conception of Chief Justice Marshall of a corporation is set forth in *Trustees of Dartmouth College v. Woodward*, 4 Wheat. (17 U. S.), 518. The fundamental conception of a private corporation created under the Constitution and law of this State is that it is an artificial entity authorized to be created to engage in any lawful business, separate and distinct from the holders of its individual stock, authorized by law to be created to enable persons to pool their interests to the extent of their several contributions to the capital stock to carry on such lawful business by the venture or stake of its capital stock in manufacturing trade or commerce."

Petitioner submits that Respondent, American Express Company, is a New York juridical person as such artificial person is known to the law; that it has the citizenship of its state of organization, the same as a corporation has citizenship; that the District Court should have entertained her suit because of the diversity of citizenship of the parties and determined the controversy on its merits.

RELIEF

Wherefore, Petitioner prays that a writ of certiorari issue out of and under the seal of this Court to review the proceedings and judgment of the United States Court of Appeals for the Sixth Circuit, and after such review, that the judgment of said Court and of the District Court dismissing Petitioner's suit may be set aside, and vacated, and that this case be remanded to the District Court for trial on the merits.

Respectfully submitted,

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APPENDIX

IN THE

District Court of the United States

for the Eastern District of Michigan, Southern Division

MYRTLE FRANCES BROCKI, *Plaintiff*, v. AMERICAN EXPRESS COMPANY, a New York corporation, *Defendant & Third-party Plaintiff*, v. DEMERY'S INC., a New Jersey corporation, *Third-party Defendant*.	Civil Action No 12,502

MEMORANDUM

Defendant American Express has filed a motion to dismiss for lack of jurisdiction. Plaintiff is a Michigan citizen. Defendant is an unincorporated joint stock association having more than 200 stockholder-members living in Michigan at the time this suit was commenced, according to the affidavit of a Senior Vice President and Secretary of American Express.

Plaintiff relies on M.S.A. 27.664 and Van Sant v. American Express Co., 169 F. (2d) 355, 370-372 (3 Cir., 1948) as its mainstays. She also seems to derive surcease from the opinion of Judge McAllister, American Federation of Musicians v. Stein, 213 F. (2d) 679 (6 Cir., 1954) which cites Van Sant in an apparently favorable manner. The issue under consideration here is a narrow one—For purposes of diversity jurisdiction, what method is the proper

one to be used in determining the citizenship of an unincorporated joint stock association? Defendant relies on a long line of cases commencing with Chapman v. Burney, 129 U. S. 677, and concluding with Swan v. First Church of Christ, Scientist, in Boston, 225 F. (2d) 745 (9 Cir., 1955). The Swan case makes reference to both the Van Sant case, supra, and the American Federation of Musicians case, supra. As to each, the Swan case contains a footnote commentary which could not express the views of this Court in a more precise manner.

M.S.A. 27.664 deals with capacity to sue. It does not purport to confer federal jurisdiction. It is not applicable to the problem at hand since no question is raised concerning capacity. The Van Sant case is a bit confusing to this writer. The part that might have application is found at page 370-372. We are convinced, however, that the Court's primary concern there had to do with capacity and that any observations as to jurisdiction are purely dicta and not determinative of any issue directly before that Court. The Court's attention there was directed toward a different question entirely, and the "distinction between suability and citizenship in this Constitutional sense may have been overlooked." Swan v. First Church of Christ, Scientist, in Boston, supra, page 748, footnote 3. The American Federation of Musicians case, supra, we are not able to accept as controlling the issue here. The Court's viewpoint there must be taken in the setting of that case which was a review of the propriety of a trial court's retention of jurisdiction for issuing a preliminary injunction to preserve the status quo until the trial court might go into the question there involved. It is expressed most aptly in the Swann case, supra, page 747, footnote 2.

We believe there is no authority —that would justify this Court in upsetting the well established rule as it is set forth in the Swan case, supra, (and by this Court in a prior case[1]) to the effect that the citizenship of its members determines the citizenship of an organization such as we have here for purposes of diversity jurisdiction. There being members who are Michigan citizens, and the plaintiff being

a Michigan citizen, it follows that diversity jurisdiction is lacking.

An order may be presented accordingly.

Dated at Detroit, Michigan, this 21st day of April, A. D. 1959.

Thomas P. Thornton,
United States District Judge.

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[1] *Murphy v. Hotel & Restaurant Employees & Bartenders International Union*, 102 F. Supp. 458 (1951).

No. 13,933

UNITED STATES COURT OF APPEALS

for the Sixth Circuit

MYRTLE FRANCES BROCKI, *Appellant,* vs. AMERICAN EXPRESS COMPANY, an Unincorporated Joint Stock Association, *Appellee,* and DEMERY'S INC., a New Jersey Corporation, *Third-Party Defendant-Appellee.*	APPEAL from the District Court of the United States for the Eastern District of Michigan, Southern Division.

Decided June 16, 1960.

Before: CECIL, WEICK and POPE, Circuit Judges.

POPE, Circuit Judge.

On February 19, 1953, appellant, a citizen of Michigan, filed this action in the court below against defendant American Express Company, which was alleged to be "a corporation organized and existing under and by virtue of the laws of the State of New York." The sole basis claimed for jurisdiction was diversity of citizenship of the parties. The defendant first answered denying the allegation that it was a corporation and alleging that it was an unincorporated joint-stock association having its principal office in New York City and having stockholder-members resident in the State of Michigan and other states and asserting that it had no citizenship other than that of its stockholder members.

Approximately six years after the filing of the complaint (apparently no steps looking to trial had then been taken), American Express Company filed a motion to dismiss the action for want of jurisdiction. The motion was supported by an affidavit of an officer of the defendant stating that American Express Company was an unincorporated joint-stock association organized and existing under the laws of the State of New York; that it maintained its principal office there, and also maintained offices in the State of Michigan, in which latter state more than 200 of its stockholder-members were resident. Plaintiff resisted this motion, asserting that under the law of the State of Michigan defendant "is regarded as a New York corporation" and that it is "suable in Michigan as a corporation by the name by which it is known." There was no controversy as to the statute under which defendant was organized.

The trial court, holding that diversity jurisdiction was lacking dismissed the action.

It seems plain that jurisdiction may be sustained here only if defendant can be held to be a corporation of the State of New York. The fact that it may be sued by its common name is not enough. Swan v. Church of Christ, Scientist, 9 Cir., 225 F. 2d 745, 747. Nor is it enough to say that defendant's organization has many features which permit it to operate and carry on its functions in a manner indistinguishable from that followed by corporations. Arbuthnot v. State Automobile Insurance Association, 10 Cir., 264 F. 2d 260, 262.

And it also seems plain that whether this defendant was made a corporation by New York depends upon the law of New York. It is significant here that the statute under which defendant was organized negatives an intention to treat such a joint-stock association as a corporation. Article I, §2, of the General Associations Law (McKinney's Consolidated Law of New York Ann., Vol. 18A), provides: "As used in this chapter: (1) the term 'joint stock association' includes every unincorporated joint stock association, company or enterprise having written articles of associa-

tion and capital stock divided into shares, but does not include a corporation or a business trust."

The New York courts have occasion to consider whether similar joint-stock associations are, or are not, corporations. They have said they are not.

In People ex rel. Winchester v. Coleman, 133 N. Y. 279, 31 N. E. 96, the court was dealing with the question whether the National Express Company, a joint-stock association of that state, was properly regarded as a corporation. After viewing the history of New York legislation relating to such organizations, the court said, 31 N. E. at 97-98: "These last and quite recent enactments show that the legislative intent is still to preserve and not destroy the original difference between the two classes of organizations; to maintain in full force the common law liability of associates, and not to substitute for it that of corporators; and, preserving in continued operation that normal and distinctive difference, to evince a plain purpose not to merge the two organizations in one, or destroy the boundaries which separate them."

That case was cited and followed in Hibbs v. Brown, 190 N. Y. 167, 82 N. E. 1108, where the court was considering the status of Adams Express Company of New York.[1]

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[1] Judge Hiscock said (82 N. E. 111): "Of course, there can be no doubt that a joint-stock association differs from a corporation, or that in its original conception and ultimate analysis it is like a partnership in respect to the individual liability of its members. . . ." Proceeding, he noted the many attributes of a corporation which the modern joint-stock association has acquired, and called this a "quasi corporate entity". Judge Bartlett's concurrence (p. 1117) said: "It is unnecessary to point out in detail the very great difference between the joint-stock association and a corporation." Judge Werners' separate concurrence, in which some of the other judges also concurred, said (p. 118). "But the company is concededly not a corporation, although our statutes have invested it with certain corporate attributes."

It follows that we must consider this to be an unincorporated association, and hence it cannot be deemed a citizen, apart from its members, for the purpose of diversity jurisdiction. Chapman v. Barney, 129 U. S. 677; Great Southern Fireproof Hotel Co. v. Jones, 177 U. S. 449; Thomas v. Board of Trustees, 195 U. S. 207; Fred Macey Co. v. Macey, 6 Cir., 135 F. 725; Taylor v. Weir, 3 Cir., 171 F. 636; Rowntree v. Adams Express Co., 8 Cir., 165 F. 152.[2]

Appellant cites the provision of Article X §4 of the New York Constitution: "The term corporations as used in this section, and in sections 1, 2 and 3 of this article shall be construed to include all associations and joint-stock companies having any of the powers or privileges of corporations not possessed by individuals or partnerships. And all corporations shall have the right to sue and shall be subject to be sued in all courts in like cases as natural persons." This means no more than that for the purposes stated in those sections—1, 2, 3 and 4 of Article X, joint-stock companies are subject to the same regulation as corporations. Attorney General v. Hill Davis Co., 261 Mich. 89, 245 N. W. 579. That such a provision does not suffice to make them corporations for the purpose of diversity of citizenship was noted in Fred Macey Co. v. Macey, supra.

Appellant cites Van Sant v. American Express Co., 3 Cir., 169 F. 2d 355. Of that case, the trial court properly said: "We are convinced, however, that the Court's pri-

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[2] Cf. Hart and Wechsler, "The Federal Courts and The Federal System", p. 917: "Unincorporated associations have never been accorded a status as jural persons for purposes of diversity jurisdiction, nor has there developed a presumption of a single citizenship of the members. This is so even when by the applicable law they have the capacity to sue and be sued in the association name. The citizenship of all the members must be looked to, and not merely that of the officers and managers."

And see Moore's Federal Practice, 2nd Ed., Vol. 3, p. 1412: "But in cases where jurisdiction is founded upon diversity of citizenship it is held that, although capacity has been accorded the unincorporated association to sue or be sued in its common name the citizenship of the individual members must, nevertheless, be made to appear, and their citizenship must be wholly diverse from that of the opposing party or parties."

mary concern there had to do with capacity and that any observations as to jurisdiction are purely dicta and not determinative of any issue directly before that Court. The Court's attention there was directed toward a different question entirely, and the 'distinction between suability and citizenship in this Constitutional sense may have been overlooked.' Swan v. First Church of Christ, Scientist, in Boston, supra, p. 748, footnote 3."

There is nothing unusual about provisions in state statutes that for the purposes of those acts joint stock associations, and other similar organizations, should be treated as corporations. Michigan has such a statute.[3] The validity of that provision has been upheld. Hemphill v. Orloff, 238 Mich. 508, 213 N. W. 867, affirmed 277 U. S. 537.[4] But such provisions do not operate to make such foreign organizations corporations for the purpose of diversity jurisdiction. The Michigan court itself has repeatedly held that for purposes other than those specially named in this statute, and in its constitution, which is similar to the New York constitution previously referred to, the distinction between corporations and unincorporated organizations such as this appellee is fully recognized. Michigan Trust Co. v. Herpolsheimer, 256 Mich. 589, 240 N. W. 6 (explaining Hemp-

[3] §97, Michigan General Corporation Act (M. S. A., §21.98): "The term 'corporations' as used in §§81 to 97, both inclusive, of this act shall be construed to include all associations, partnership associations limited joint stock companies and common law trust or trusts created by statute having any of the powers or privileges of corporations, not possessed by individuals or partnerships, under whatever term or designation they may be defined and known in the state where organized."

Hence a foreign joint stock association, entering Michigan, is required by this section and one of the sections mentioned therein to procure a certificate of authority from a Michigan commission, in the same manner as if it were a foreign corporation.

[4] The record shows that appellee here complied with that requirement and procured a certificate of compliance from the Michigan Corporation and Securities Commission. The certificate described American Express Company as a New York corporation.

hill v. Orloff, supra); Attorney General v. Hill-Davis Co., 261 Mich. 89, 245 N. W. 579, 580.[5]

It is not questioned that should a state endow a business organization, by whatever name called, with all the powers and characteristics of a corporation, without declaring it not to be one, it might be found to be a corporation for diversity purposes. Such a case was Puerto Rico v. Russell & Company, 288 U. S. 476. That case dealt with a *sociedad* under the code of Puerto Rico, which carried the traditions of the civil law. But in deciding that case the court recognized the continued force of its decisions in Chapman v. Barney, 129 U. S. 677, and Great Southern Fireproof Hotel Co. v. Jones, 177 U. S. 449.[6] Here the New York statutes and the New York decisions have long, as we have noted, indicated that state's policy not to make organizations like appellee association corporations of that state. This purpose cannot be ignored.

The judgment is affirmed.

JUDGMENT

(Filed June 16, 1960)

Appeal from the United States District Court for the Eastern District of Michigan.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Michigan, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

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[5] "This express enumeration in the Constitution of the purposes for which partnership associations are declared to be corporations is an implied exclusion of their being corporations for other purposes."

[6] Said Court: (288 U. S. 480) "The tradition of the common law is to treat as legal persons only incorporated groups and to assimilate all others to partnership. Chapman v. Barney, supra; Great Southern Fireproof Hotel Co. v. Jones, supra. The tradition of the civil law, as expressed in the Code of Puerto Rico, is otherwise. Therefore, to call the *sociedad en comandita* a limited partnership in the common law sense, as the respondents and others have done, is to invoke a false analogy."

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In The

Supreme Court of the United States

MYRTLE FRANCES BROCKI,
Petitioner,
— vs. —
AMERICAN EXPRESS COMPANY,
an unincorporated joint stock association (defendant and third-party plaintiff below)
and
DEMERY'S, INC.,
a New Jersey corporation
(third-party defendant below),
Respondents.

October Term, 1960
No. 317

ON THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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In The

Supreme Court of the United States

MYRTLE FRANCES BROCKI,
Petitioner,

— vs. —

AMERICAN EXPRESS COMPANY,
an unincorporated joint stock association (defendant and third-party plaintiff below)

and

DEMERY'S, INC.,
a New Jersey corporation (third-party defendant below),
Respondents.

October Term, 1960
No. 317

ON THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

AMERICAN EXPRESS COMPANY and DEMERY'S, INC., respondents herein, respectfully request that the Petition for Writ of Certiorari heretofore filed in this matter be denied.

QUESTION PRESENTED

Does an unincorporated joint stock association, organized under the laws of the State of New York and having members who are citizens of Michigan, have citizenship independent of that of its members for the purpose of federal jurisdiction based on diversity of citizenship?

STATEMENT OF THE CASE

This is an action originally brought in the United States District Court for the Eastern District of Michigan, Southern Division, by Petitioner, Myrtle Frances Brocki, a citizen of Michigan, against Respondent, American Express Company. All references to "Respondent" hereafter will denote American Express Company unless otherwise stated.

In her complaint, Petitioner alleged that defendant "* * * a corporation organized and existing under and by virtue of the laws of the State of New York * * *" and that for the purpose of giving this court jurisdiction, it is considered as a citizen of the State of New York" (2a). Respondent's Answer denied that Respondent is a corporation and stated in support of that denial "that defendant is an unincorporated joint stock association having its principal office in the City and State of New York, having stockholder members resident in the State of Michigan and in other states, and that it has no citizenship independent of that of its stockholder members" (6a).

In her Complaint Petitioner claimed federal jurisdiction based on diversity of citizenship and an amount in excess of $3,000.00 (2a). In its Answer Respondent denied the existence of diversity or the requisite jurisdictional amount (6a).

The Complaint and Answer were filed in 1953. No further action of significance to this Petition ensued until 1959, when Respondent filed its Motion to Dismiss for Lack of Jurisdiction. In its Motion, Respondent

The letter "a" preceded by a numeral refers to a page of the Record herein filed.

repeated the allegation of its Answer with respect to its status as an unincorporated joint stock association having members resident in Michigan, and denied the existence of diversity of citizenship between the Petitioner and the Respondent (10a). This Motion was supported by the Affidavit of Norman F. Page, Senior Vice President and Secretary of American Express Company (11a).

Petitioner answered this Motion, not denying the fact that Respondent is an unincorporated joint stock association having members in Michigan but claiming that despite such status, Respondent has citizenship in New York for the purpose of federal diversity jurisdiction (12a). In support of its answer to the Motion, Petitioner submitted the Certificate of the Michigan Corporation and Securities Commission describing American Express Company as "a New York corporation" (14a).

OPINION OF THE DISTRICT COURT

After hearing and argument on the Motion, the District Court filed a Memorandum Opinion, 172 F. Supp. 648, which states the case as follows (App. 19):*

> "Defendant American Express has filed a motion to dismiss for lack of jurisdiction. Plaintiff is a Michigan citizen. Defendant is an unincorporated joint stock association having more than 200 stockholder members living in Michigan at the time this suit was commenced, according to the affidavit of a Senior Vice President and Secretary of American Express."

The District Court noted that "Defendant relies on a

*The abbreviation "App" followed by a numeral refers to a page of the Appendix filed with the Petition.

long line of cases commencing with *Chapman v. Barney*, 129 U. S. 677 [illegible] (App. 20) and, after discussing the authorities relied upon by both parties, concluded (App. 20-21):

> "We believe there is no authority that would justify this Court in upsetting the well established rule [illegible] to the effect that the citizenship of its members determines the citizenship of an organization such as we have here for purposes of diversity jurisdiction. There being members who are Michigan citizens, and the plaintiff being a Michigan citizen, it follows that diversity jurisdiction is lacking."

On May 12, 1958, the District Court entered its Order (Supra) in accordance with its Memorandum Opinion dismissing the case, and Petitioner thereupon took an appeal to the United States Court of Appeals for the Sixth Circuit.

OPINION OF THE COURT OF APPEALS

In her brief and argument before the Court of Appeals, Petitioner sought initially to establish that a joint stock association organized and existing under the laws of the State of New York is regarded by the New York courts as a corporation under New York law. In its opinion (App. 22-27), the Court carefully examined applicable New York constitutional, statutory and case law (App. 23-25) and thereupon concluded (App. 24-25):

> "The New York courts have [sic] occasion to consider whether similar joint stock associations are, or are not, corporations. They have said they are not."

> "It follows that we must consider this [illegible]

> an unincorporated association, and hence it cannot be deemed a citizen, apart from its members, for the purpose of diversity jurisdiction. Chapman v. Barney, 129 U.S. 677; Great Southern Fireproof Hotel Co. v. Jones, 177 U.S. 449; Thomas v. Board of Trustees, 195 U.S. 207 * * *".

Petitioner then argued, as she had unsuccessfully argued before the District Court, that the case should be controlled by *Van Sant v. American Express Company*, 169 F. 2d 335 (C.A. 3rd, 1948), wherein diversity jurisdiction was assumed by the Third Circuit because the defendant could "be sued in its own name." The Court of Appeals rejected this argument, adopting the language of the trial court in its examination of the *Van Sant* case (App. 25-26):

> "We are convinced, however, that the Court's primary concern there had to do with capacity and that any observations as to jurisdiction are purely dicta and not determinative on any issue directly before that Court. The Court's attention there was directed toward a different question entirely, and the distinction between suability and citizenship in this constitutional sense may have been overlooked."

Petitioner also urged that the decision in *Puerto Rico v. Russell & Company*, 288 U.S. 476, 53 S. Ct. 447, 77 L. Ed. 903 (1932) invested Respondent with New York citizenship for purposes of diversity jurisdiction. But the Court of Appeals decided otherwise (App. 27):

> "It is not questioned that should a state endow a business organization, by whatever name called, with all the powers and characteristics of a corporation, without declaring it not to be one, it might be found to be a corporation for diversity

purposes. Such a case was Puerto Rico v. Russell & Company, 288 U.S. 476. That case dealt with a *sociedad* under the code of Puerto Rico, which carried the traditions of the civil law. But in deciding that case the court recognized the continued force of its decisions in Chapman v. Barney, 129 U.S. 677, and Great Southern Fireproof Hotel Co. v. Jones, 177 U.S. 449. Here the New York statutes and the New York decisions have long, as we have noted, indicated that state's policy not to make organizations like appellee association corporations of that state. This purpose cannot be ignored."

Finally, Petitioner sought to show that the State of Michigan had determined Respondent to be a New York corporation. The Court recognized that a foreign joint stock association, entering Michigan, is required by Michigan statute to procure a certificate of authority from the Michigan Corporation and Securities Commission, "in the same manner as if it were a foreign corporation" and noted that American Express Company had procured such a certificate (App. 26). The Court then examined Petitioner's contention based upon these statutory requirements (App. 26):

> "There is nothing unusual about provisions in state statutes that for the purposes of those acts joint stock associations, and other similar organizations, should be treated as corporations. *** But such provisions do not operate to make such foreign organizations corporations for the purpose of diversity jurisdiction. The Michigan court itself has repeatedly held that for purposes other than those specially named in this statute, and in its constitution, which is similar to the New York constitution previously referred to, the distinction between corporations and unincorporated organi-

zations such as this appellee is fully recognized. Michigan Trust Co. v. Herpolsheimer, 256 Mich. 589, 240 N.W. 6 (explaining Hemphill v. Orloff, supra); Attorney General v. Hill-Davis Co., 261 Mich. 89, 245 N.W. 579, 580."

On June 16, 1960, the United States Court of Appeals for the Sixth Circuit entered judgment for Respondent, affirming the judgment of the trial court.

ARGUMENT

Introduction

Contrary to the contentions of Petitioner (Petition, pages 2 and 3) there are no "special and important reasons" for review of the decision of the Court of Appeals. The question presented is not unsettled. In fact, the precise question involved here was resolved by this Court in 1889 in *Chapman v. Barney*, 129 U.S. 677, which ruling was followed by the Court below. Nor is there conflict between the decision appealed from and the decision of any other Court of Appeals. In the allegedly conflicting case of *Van Sant v. American Express Company*, 169 F. 2d 355 (C.C.A. 3rd, 1948), the Court of Appeals for the Third Circuit apparently overlooked the point at issue here, resting its decision on other grounds. The decision below rests on a solid and established foundation of controlling state and federal precedent, and in particular upon the opinion of this Court in *Chapman v. Barney, supra*. The Petition presents no basis for review by Writ of Certiorari.

The Question Presented Here Was Settled by this Court in Chapman v. Barney

Federal District Courts have original jurisdiction over controversies between citizens of different states, if the required amount is involved, by authority of the United States Constitution, Article III, Section 2,[3] and 28 U.S.C. 1332.[4] Although a corporation is deemed by statute a

[3] "SECTION 2. The Judicial Power shall extend to all Cases, in Law and Equity * * * between Citizens of different States * * *."

[4] "(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between

(1) citizens of different States; * * *

(c) For the purposes of this section * * * a corporation shall be deemed a citizen of any State by which it has been incorporated and of the States where it has its principal place of business * * *."

citizen of the state of its incorporation for federal jurisdictional purposes, neither the statute nor the cases have ever excluded this concept to unincorporated associations. *Chapman v. Barney*, 129 U. S. 677, 9 S. Ct. 426, 32 L. Ed. 800 (1889); *Great Southern Fireproof Hotel Company v. Jones*, 177 U.S. 449, 20 S. Ct. 690, 44 L. Ed. 842 (1900); *Thomas v. Board of Trustees of Ohio State Univers'ty*, 195 U.S. 207, 25 S. Ct. 24, 49 L. Ed. 160 (1904). More specifically, the *Chapman* case holds that a joint stock association cannot be a citizen of a state, within the meaning of the statutes regulating jurisdiction of the federal courts, independent of the citizenship of its stockholder members. And although Congress has amended 28 U.S.C. 1332 several times since the *Chapman* case was decided in 1889, there has never been any Congressional action enlarging the scope of "corporation" in that statute so as to include joint stock associations.

The Petition in the instant case makes no mention of the *Chapman* decision. Respondent contends that *Chapman v. Barney* controls this case and obviates any conflict allegedly created between Circuits by the *Van Sant* decision.

The *Chapman* case was, in its original form, an action of assumpsit brought by the United States Express Company, a joint stock association organized under the laws of New York, against Chapman, a citizen of Illinois, in a United States District Court in Illinois. The Supreme Court raised the issue of jurisdiction for the first time on appeal; the issue had not been argued below or before the Court. Justice Lamar had the following to say on page 682 of the opinion:

> "On looking into the record we find no satisfactory showing as to the citizenship of the plaintiff.

The allegation of the amended petition is, that the United States Express Company is a joint stock company organized under a law of the State of New York, and is a *citizen* of that State. *But the express company cannot be a citizen of New York within the meaning of the statutes regulating jurisdiction, unless it be a corporation.* The allegation that the company was *organized* under the laws of New York is not an allegation that it is a corporation. In fact, the allegation is, that the company is *not* a corporation, but a joint-stock company—that is, a mere partnership. And, although it may be authorized by the laws of the State of New York to bring suit in the name of its president, that fact cannot give the company power, by that name, to sue in a Federal court.

"The company may have been organized under the laws of the State of New York, and may be doing business in that State, and yet all the members of it may not be citizens of that State. The record does not show the citizenship of Barney or of any of the members of the company.***

"For these reasons we are of the opinion that the record does not show a case of which the Circuit Court could take jurisdiction. The judgment of that court must therefore be reversed at the costs, in this court, of the defendant in error."

(Emphasis supplied)

Chapman v. Barney clearly sets forth the law governing the citizenship, for diversity purposes, of joint stock companies. It has been cited and approved in *Puerto Rico v. Russell & Company*, 288 U.S. 476, 53 S. Ct. 447, 77 L. Ed. 903 (1932). Likewise, *Chapman* has been approved by various United States Courts of Appeals in *Taylor v. Weir*, 171 F. 636 (C.C.A. 3rd, 1909); *Fred Macey Co., Ltd. v. Macey*, 135 F. 725 (C.C.A. 6th, 1905); *Rountree v.*

Adams Express Company, 165 F. 152 (C.A.A. 8th, 1908); *Swea v. First Church of Christ, Scientist*, 225 F. 2d 745 (C.A. 9th, 1955); and *Arbaugh v. State Automobile Insurance Association*, 264 F. 2d 260 (C.A. 10th, 1959).

The Decision Below Does Not Conflict with the Van Sant Case

In *Van Sant v. American Express Company, supra*, the jurisdictional question was first raised by defendant American Express Company when the case was before the Court of Appeals for the Third Circuit on rehearing, after a directed verdict for defendant had been reversed and remanded for a new trial. The Court did not appear to think well of this tardiness of assertion (at page 372):

> "By Rule 17 (b) of the Federal Rules of Civil Procedure[*], the law of Pennsylvania determines the capacity of American Express to sue or be sued. The Pennsylvania Rules of Civil Procedure provide that a joint stock company or association may be sued in its own name. American Express was here sued in its own name. It appeared and defended without objection and obtained a direction of verdict in the trial court. It never raised the question of its suability as an entity until, after rehearing the present appeal, we reversed the judgment and sent the case back for retrial.
>
> "Neither the facts nor the law indicate that such contention should now prevail. The point involved, in our view, is not under the rule of *Chapman v. Barney*[**] and similar cases as appellee insists but is simply as Professor Moore puts it

[*] Rule 17 (b) reads as follows:

"* * * In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held, except that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States. * * *"

> in his book that 'a partnership or other unincorporated association may always sue or be sued in its common name if' the law of the state in which the district court is held 'recognizes such capacity'."

The Court then denied defendant's motion to dismiss.

The United States Court of Appeals for the Third Circuit in *Van Sant v. American Express Company, supra*, evidently recognized the continuing force of the *Chapman* case by attempting to distinguish it. In so doing, however, that Court failed to make the necessary distinction between suability as an entity and citizenship for purposes of federal diversity jurisdiction.

The failure of the *Van Sant* Court to distinguish diversity of citizenship and capacity to be sued in the common name of the company is explicitly criticized in *Swan v. First Church of Christ, Scientist, supra*, at p. 747:

> "This distinction between suability and citizenship in this constitutional sense may have been overlooked in *Van Sant v. American Express Co.*, 3 Cir., 169 F. 2d 355, 372."

It thus appears that rather than creating a conflict between circuits, the *Van Sant* decision stands as an isolated example of confusion of citizenship with capacity. It is fair to say that wherever the issue here presented has been recognized as a question of citizenship for purposes of diversity jurisdiction, the rule of *Chapman v. Barney* has been uniformly followed by the courts. The Court of Appeals in this case, when confronted with this issue, applied the *Chapman* rule to the facts, while the *Van Sant* court never met the issue in the first instance. The two cases do not conflict; they do not decide the same question. There is no conflict between Circuits which would justify review on writ of certiorari in this case.

Petitioner's Additional Argument Creates No Reason For Review by Writ of Certiorari in this Case

Petitioner's Argument, beginning on page 8 of the Petition, re-asserts three of her arguments to the Court below. Petitioner maintains (1) that Respondent is considered a corporation for all purposes by the New York Courts under New York law, (2) that Respondent has been determined to be a corporation by the State of Michigan as a condition of doing business within the State, and (3) that Respondent must be considered a corporation for purposes of diversity jurisdiction under the rule of *Puerto Rico v. Russell & Company, supra.* As a part of her third argument, Petitioner alleges that the decision of the Court of Appeals in the instant case is "in conflict" with the *Puerto Rico* decision, and as a part of her second argument, that the instant decision of the Sixth Circuit is "in conflict" with *Hemphill v. Orloff*, 238 Mich. 508, 213 N.W. 867 (1927), aff'd 277 U.S. 537, 48 S. Ct. 577, 72 L. Ed. 978 (1928).

The argument first listed above was given point by point consideration by the United States Court of Appeals for the Sixth Circuit, citing the New York General Associations Law, Article 1, Section 2,* found in McKinney's Consolidated Laws of New York, Annotated, Volume 18 A, and the cases of *People ex rel Winchester v. Coleman*, 133 N.Y. 279, 31 N.E. 96 (1892) and *Hibbs v. Brown*, 190 N.Y. 167, 82 N.E. 1108 (1907) to show that corporations and joint stock associations are not the same entities under New York law.

*"As used in this chapter: (1) the term 'joint stock association' includes every unincorporated joint stock association, company or enterprise having written articles of association and capital stock divided into shares, **but does not include a corporation** or a business trust." (Emphasis Supplied)

Petitioner's second argument, that the State of Michigan has determined Respondent to be a corporation, was rejected by the Court of Appeals, citing *Michigan Trust Company v. Herpolsheimer*, 256 Mich. 589, 240 N.W. 6 (1932), and *Attorney General v. Hill-Davis Company*, 264 Mich. 89, 245 N.W. 579 (1932). In the *Herpolsheimer* decision, the Michigan Supreme Court considered the status of a common law trust and held at pages 595-596:

> "* * * It is a voluntary association and recognized as such by the statutes which provide that it may sue and be sued.
>
> "It is contended, however, that this court has decided that a common-law trust constitutes a corporation within the meaning of the Constitution. *Hemphill v. Orloff*, 238 Mich. 508 (58 A.L.R. 507), stripped of surplus verbiage, holds a common law trust organized outside of Michigan amenable to the statute of Michigan regulating the right of foreign corporations attempting to do business in the State, which statute provides:
>
> "'The term "corporations" as used in this act shall be construed to include all associations, partnership associations and joint stock companies having any of the powers or privileges of corporations, not possessed by individuals or partnerships, under whatever term or designation they may be defined and known in the State where organized.' 2 Comp. Laws 1915, 9067 (see Act No. 327, Pub. Acts 1931, 597)."

The Court then discussed other cases including *Nedeau v. United Petroleum*, 251 Mich. 673, 232 N.W. 272 (1930), and concluded at page 597:

> "The language of this [Michigan] decision clearly indicates the distinction between a common law trust and a corporation, but upholds the legis-

> tive power to make the corporation law relative to the filing of the annual reports applicable to such common law trusts."

The same language may be applied with equal force to the status of defendant as a joint stock company doing business in Michigan. In *Attorney General v. Hill Dairy Company, supra*, the Court held that despite the provisions of the Michigan Constitution and of the statutes of the State of Michigan describing partnership associations as corporations, the character of such associations had not been changed. In support of its position that partnership associations were not corporations, the Court cited, *inter alia*, *First Mortgage Co., Ltd., v. Marcus, supra*, and *Great Southern Fireproof Hotel Co. v. Jones, supra*. With respect to the provisions of the Pennsylvania Constitution involved in the latter case, and similar to the above mentioned provisions of the Michigan Constitution, the Court stated (177 U.S. 456):

> "The only effect of that change is to place the joint stock companies or associations referred to under the restrictions imposed by that article upon corporations; *they still remain without all the attributes of corporations.*"

(Emphasis supplied.)

The Court in the *Hill Dairy* case concluded at page 93:

> "The legislature has power by its fiat to make a partnership association a corporation."

Finally, Petitioner argues that the instant case comes under the rule of *Puerto Rico v. Russell & Company, supra*. The Sixth Circuit properly recognized that the *Puerto Rico* case, decided under the rule of Puerto Rico v. Rosaly, 227 U.S. 270, found the defendant was not a corporation because it possessed all of the attributes of a corporation

under the law of its creation. The Court of Appeals then quotes the *Puerto Rico* opinion at 288 U.S. 480, 481:

> "The tradition of the common law is to treat as legal persons only incorporated groups and to assimilate all others to partnership. *Chapman v. Barney, supra; Great Southern Fireproof Hotel Co. v. Jones, supra.* The tradition of the civil law, as expressed in the Code of Puerto Rico, is otherwise. Therefore, to call the *sociedad en comandita* a limited partnership in the common-law sense, as the respondents and others have done, is to invoke a false analogy."

To call Respondent a corporation under the law of New York is an equally false analogy, as has been shown by the Court of Appeals in its analysis of the applicable New York authorities.

None of these arguments supports a contention that the decision below conflicts with established precedent or presents an undecided question meriting review by this Court.

SUMMARY

Petitioner has failed to show special and important reasons for review of this case by the grant of a Writ of Certiorari. The alleged conflict between Circuits disappears in the light of the decision in *Chapman v. Barney, supra*, and similar cases decided by five United States Courts of Appeals. Petitioner has failed to show that Respondent is considered a corporation by the New York courts under New York law, that the State of Michigan has determined Respondent to be a corporation, or that the law creating and regulating Respondent brings it under the rule of the Puerto Rico case. Petitioner's con-

tentions here were carefully considered and correctly rejected by the Court below.

CONCLUSION

WHEREFORE, Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 317

MYRTLE FRANCES BROCKI,
Petitioner,
vs.
AMERICAN EXPRESS COMPANY,
a New York Joint Stock Association,
and
DEMERY'S, INC., a New Jersey corporation,
Respondents

PETITIONER'S REPLY TO RESPONDENTS' BRIEF

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INAPPLICABILITY OF CHAPMAN v. BARNEY, 129 U. S. 677

(Figures in parentheses refer to pages of Appellant's Appendix unless context clearly indicates otherwise)

Respondents rely upon *Chapman v. Barney*, 129 U. S. 677, in support of their claim that a New York Joint Stock Association has no citizenship for purposes of diversity jurisdiction. Petitioner submits that this case does not control the case at bar. *Chapman v. Barney, supra*, was decided on the insufficiency of the allegation in plaintiff's pleading to make the rule of corporate citizenship appli-

cable. The Court stated there was "no satisfactory showing as to the citizenship of the Plaintiff". The Court specifically stated at page 682:

> "On looking into the record, we find no satisfactory showing as to the citizenship of the plaintiff. The allegation of the amended petition is that the United States Express Company is a joint stock company organized under a law of the state of New York, and is a citizen of that state. But the express company cannot be a citizen of New York, within the meaning of the statutes regulating jurisdiction, unless it be a corporation. The allegation that the company was *organized* under the laws of New York is not an allegation that it is a corporation. In fact, the allegation is that the company is *not* a corporation, but a joint stock company,—that is, *a mere partnership.* And, although it may be authorized by the laws of the state of New York to bri... suit in the name of its president, that fact cannot give the company power, by that name, to sue in a federal court." (Emphasis added.)

Chapman v. Barney, supra, only decided that the bare allegation that a company is a joint stock association is "not an allegation that it is a corporation" but is " a mere partnership". It was decided in the atmosphere of 1889 when pleadings were strictly construed against the pleader and the omission of a word was fatal. Today a different rule would apply: "All pleadings shall be so construed as to do substantial justice." [Federal Rules of Civil Procedure, Rule 8(f).] In the case at bar, Petitioner has affirmatively alleged that Respondent, American Express Company, is a New York corporation (2a), and she has established that New York law makes it a juridical person. In her petition for writ of certiorari, Petitioner has cited the applicable New York law which invests a New York joint stock association with all corporate characteristics and

powers. *Respondent does not deny that it has all such characteristics and powers.* These include perpetuation of the organization upon the death of a stockholder or any other transfer of his shares; it has articles of association filed with New York authorities in the same manner as corporations; its articles of association must "prescribe the number of its directors, * * * to have the sole management of its affairs"; it admits it has over 22,000 stockholders (11a).

This organization is a far cry from the association inadequately pleaded in *Chapman v. Barney*, 129 U. S. 677, decided in 1889. This Court there observed that the joint stock association was only "authorized by the laws of the state of New York to bring suit in the name of its president". There was no showing that New York law then created the association as a legal entity separate and distinct from its stockholders. Here the petition for writ of certiorari shows that a New York joint stock association now has the *constitutional right* to be sued in its own name as a natural person (Article X, Section 4, Constitution of New York) and thus New York has created a legal entity apart from group who own it.

The Court, in 1889, in deciding *Chapman v. Barney, supra*, indicated that at that time a pleader's allegation that a party is a joint stock association alleges only "a mere partnership". A review of the Constitution and Statutes of New York shows that under present legal concepts, a New York joint stock association is an entity separate and distinct from its stockholders and is not a mere partnership. Respondent is not justified in making the unsupported statement that it is an "unincorporated association". The present New York law requiring the filing of written articles of association with public authori-

ties, annual reports, privilege fees, etc. plus statutory requirements of corporate government, such as a board of directors not less than three, to have the "sole management" of its business, indicates corporate organization.

Respondent should not be permitted to evade federal jurisdiction by calling itself "a joint stock association" without indicating in what manner its *organization* differs from conventional concepts of a corporation. A joint stock association has now been given all corporate powers and privileges so that in this day and age an allegation that a company is a "New York joint stock association" does not even suggest that it is a "mere partnership" as in 1889 when *Chapman v. Barney* was decided. It is now the equivalent of an allegation of New York incorporation. The Michigan Supreme Court at an early stage in its history recognized this evolutionary process in *Lyon v. Denison*, 80 Mich. 371, when it said (p. 380):

> "There is an essential difference between a joint-stock company as it existed at the common law, and a joint-stock company having extensive statutory powers, conferred upon it by the state within which it is organized."

Petitioner has pointed out that Congress has recognized this development when it defined the term "person" to include a joint stock association, (1 U. S. C. A. par. 1); that the State of New York recognized the development when it defined the term "person" to include a New York joint stock association (General Construction Law of New York, Article 2, par. 37).

The bare plea of "joint stock association" no longer indicates conclusively that the organization is not a juridical person. Petitioner contends that the statutory characteristics of a New York joint stock association now equal the

traditional concepts of a corporation; that the present New York joint stock association is a "juridical person" separate and distinct from its 22,000 stockholders who have no personal interest in any controversy between Petitioner and the organization in which they are mere investors. The difference today is a matter of label only! Federal jurisdiction should not be lost because of the name by which an entity is known.

CONFLICT BETWEEN THIRD AND SIXTH CIRCUITS

Respondent seeks to distinguish *Van Sant v. American Express Company*, 169 Fed. (2d) 355, by stating that the Court "failed to make the necessary distinction between suability as an entity and citizenship for purpose of federal diversity jurisdiction" (Respodndent's brief, p. 12). Respondent seeks to divert this Court's attention from the basic proposition that the Court in *Van Sant v. American Express Company, supra*, could only acquire jurisdiction on a diversity basis. The Court in commencing its discussion stated that "since this is a diversity of citizenship case," that it would be obligated to follow the law of the state wherein the Court sits. The question of diversity jurisdiction was then discussed. Naturally, the question of suability had to be answered first. The Court hearing *Van Sant v. American Express Company* was sitting in Pennsylvania. Plaintiff in that case was a citizen of Pennsylvania and the American Express Company was alleged to be a citizen of New York. The only possible basis for jurisdiction was diversity of citizenship. There can be no doubt that the decision in *Van Sant v. American Express Company* is in complete conflict with the decision of the Court of Appeals for the Sixth Circuit in the instant case.

Respondent, and the lower Court, relied upon *Swan v. First Church of Christ, Scientist, in Boston*, 225 Fed. (2d) 745 (Ninth Circuit, 1955) (15a) to support the proposition that a joint stock company does not have citizenship for diversity purposes. An analysis of the opinion in that case will show that it supports the position of Petitioner rather than the position of Respondent. *Swan v. First Church of Christ, Scientist, supra,* arose in a District Court in California, and involved a controversy between the Plaintiff and Defendant Church which Plaintiff alleged was a Massachusetts corporation. The Defendants claimed that they were trustees for the church and had possession of and maintained church property, but that such trusteeship did not constitute corporate existence; that the trustees had very limited powers under the law of Massachusetts. The Court examined Massachusetts law and concluded that the trustees and officers of the church constituted a corporation under Massachusetts law, and that diversity of citizenship existed. The Court there said (p. 747):

> "Jurisdiction here may be found only if it can be said that a defendant can be held to be a corporation of a state other than that of plaintiff's residence. It is not enough to say that these organizations might be sued by their common names, without naming the individual members. * * * Jurisdiction here depends upon the concept of 'citizens of different States' in Article III of the Constitution and in Sec. 1332 of Title 28."

(p. 748):

> "They are 'deemed' bodies corporate, for they automatically become such whenever they fit the statute, and without other formality. It is true that such corporations have powers which are very limited. Corporations vary greatly in the extent of their powers and the breadth of their purposes. But

> the concept of citizenship for diversity jurisdiction, as applied to corporation, has never been dependent upon the scope of their powers. * * *
>
> We hold that the Church and the Directors named were a corporation and subject to suit in the court below."

(p. 749, footnote 6):

> "While the view we take of the corporate character of the Church and the Directors means that we agree that the requisite diversity of citizenship existed, * * *."

It is Petitioner's claim that American Express Company "fits the statute" of the State of New York, and that it is a corporation.

It is interesting to note that in *Swan v. First Church of Christ, Scientist, supra,* the Court was influenced by the fact that the trustees qualified as a foreign corporation in California (footnote 5, p. 749):

> "The trial court found that the Church and the Board of Directors had previously qualified as corporations in the State of California and made the necessary filing with the Secretary of State for that purpose * * *."

In the case at bar the American Express Company has qualified to transact business in Michigan as a New York corporation, and it should be held to this position.

Respondent has not placed before this Court its articles of association, by-laws, stockholders rights and powers, or any other information to enable this Court to evaluate it to determine as a matter of law whether or not it is a corporation. Throughout all argument it has been content to rely upon the bare label that it is a New York joint stock

association. Petitioner maintains that examination of the New York Constitution and statutes shows that Respondent is a "juridical person" separate and distinct from its stockholders, and, in the absence of a showing to the contrary, it should be treated as a corporation for federal diversity jurisdiction.

RELIEF

Petitioner submits that there is an irreconcilable conflict between the decisions of the Third Court of Appeals and the Sixth Court of Appeals; that it is a matter of importance to Petitioner and the public to know whether or not the American Express Company can be sued in a Federal Court on a diversity basis, and that this Court should grant the Petition for certiorari to resolve the conflict.

Respectfully submitted,

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